STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL11JB-65475

Valerie King,	)	
	)	
Complainant,	)	
	)	
<b>v.</b>	)	Administrative Action
	)	FINDING OF PROBABLE CAUSE
PennReach Inc. and Pennrose	)	
Management Co.,	)	
	)	
Respondents.		

On August 3, 2015, Valerie King (Complainant), a Mercer County resident, filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that Respondent PennReach, Inc. fired her in reprisal for complaining about race discrimination, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49. On January 12, 2016, DCR amended the complaint to add Pennrose Management Company as a respondent, and to add allegations that Pennrose subjected Complainant to unlawful reprisal and that PennReach aided and abetted that retaliatory conduct. During the course of the investigation, it became evident that Complainant was also claiming that Respondents subjected her to a racially hostile work environment in violation of the LAD. Respondents denied the allegations of discrimination in their entirety. DCR's ensuing investigation found as follows.

## **Summary of the Investigation**

The Pennrose companies develop and manage affordable housing and related real estate in a number of states. One of its affiliates, Pennrose Management Company (PMC), is a property management company that owns and operates Academy Place, a residential building on Olive Street in Trenton. On or around April 14, 2014, PMC hired Complainant to work at Academy Place as a residential counselor.

On January 1, 2015, PennReach, Inc. became Complainant's employer of record. On its website, PennReach describes itself as "a non-profit organization founded in December 13, 2011 by housing industry leaders dedicated to the social mission of affordable housing." PennReach describes its mission as "addressing the holistic needs of the individual by providing good quality affordable housing, employment opportunities, education, health services and training for all people in need--whether seniors, families facing challenges of low income and related problems or people with special needs." Krystal O'Dell is currently PennReach's Chief Executive Officer.

<sup>&</sup>lt;sup>1</sup> During the course of the investigation, DCR discussed with both Respondents the factual underpinnings of the retaliation claims and the hostile work environment claim. As these claims relate back to the allegations set forth in the original complaint, the verified complaint is amended to include them. N.J.A.C. 13:4-2.9(b).

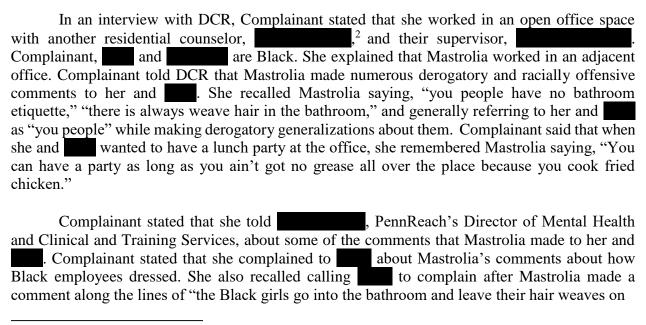
O'Dell served as the director of support services for PMC until late 2015. Timothy Henkel, a principal and senior vice president of PMC, also serves on the PennReach Board of Directors. PMC and PennReach shared office space in the Academy Place building on Olive Street.

O'Dell told DCR that until PennReach became Complainant's employer on January 1, 2015, PennReach "leased" Complainant from PMC. DCR's investigation showed that PennReach provides services to Academy Place residents under a contract with PMC. See PMC Management Company Agreement for Contracted Services with PennReach at Academy Place (the Agreement). As part of the Agreement, PMC gave PennReach use of office space at Academy Place free of charge. Id. at Scope of Services, Deliverables, Paragraph 4. The Agreement also gave PMC the ability to monitor PennReach's activities to ensure that they were "aligned with [PMC's] goals," and realign the priorities if PMC determined that PennReach's staff was not fulfilling PMC's goals. Id. at Scope of Services, Supervisory Standards. In addition, PMC reserved the right to "recommend and require changes in programming to ensure" that its performance standards were being met. Id. at Scope of Services, Performance Standards.

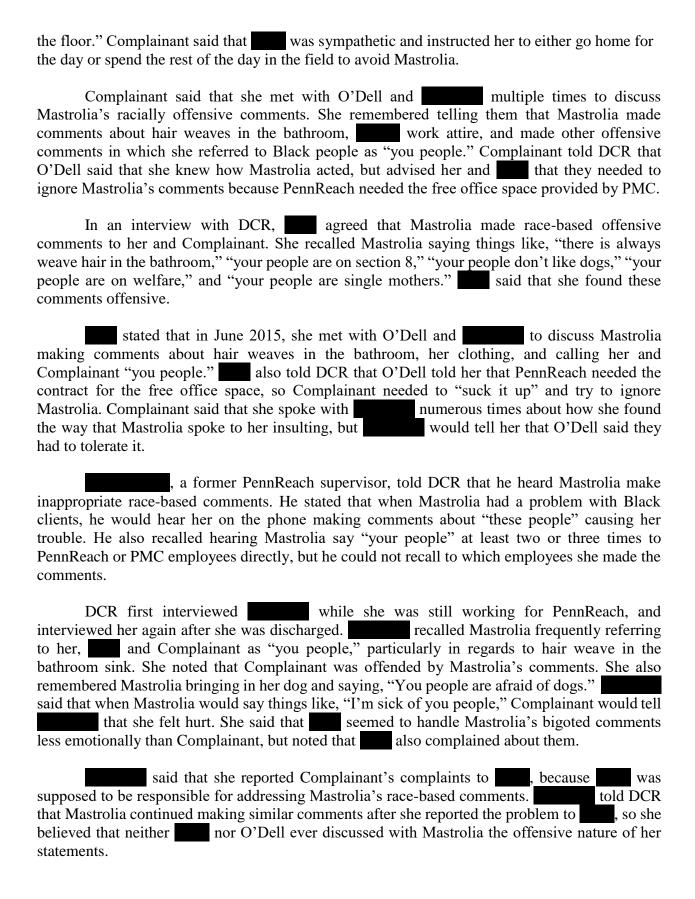
In an interview with DCR, PennReach office manager stated that O'Dell received and followed instructions from PMC regarding how PennReach employees completed their duties or the way in which they undertook different tasks.

Complainant worked as a residential counselor at Academy Place until July 27, 2015, when she was notified that she would be transferred to a distant location with a reduction in pay. She declined to accept that transfer, resigned, and filed this complaint with DCR alleging that the transfer and pay cut were reprisal for complaining that PMC's building manager, Dawn Mastrolia, made racist comments to her and other PennReach employees.

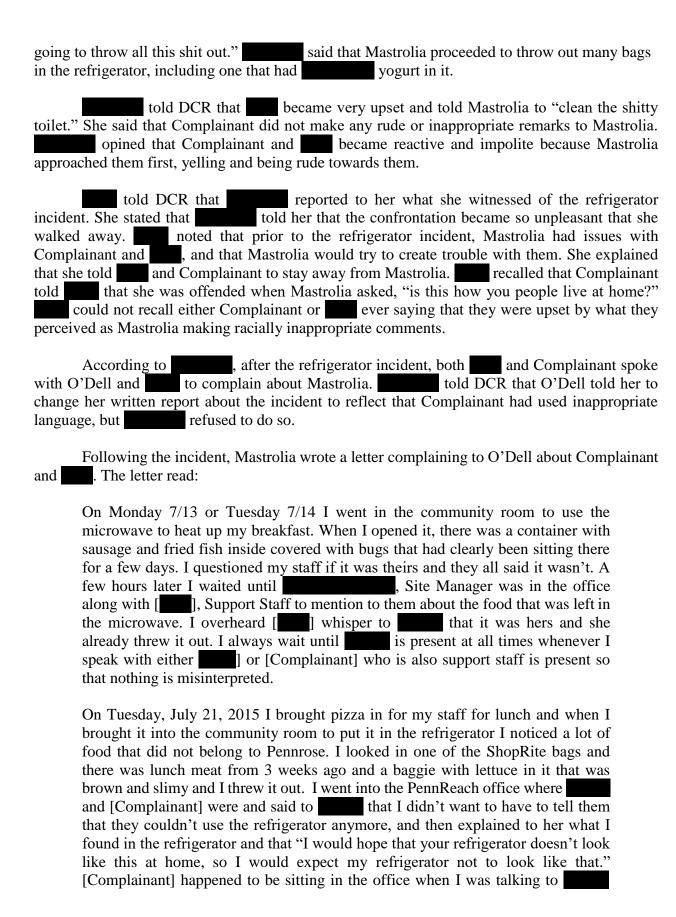
## A. Racially Hostile Work Environment

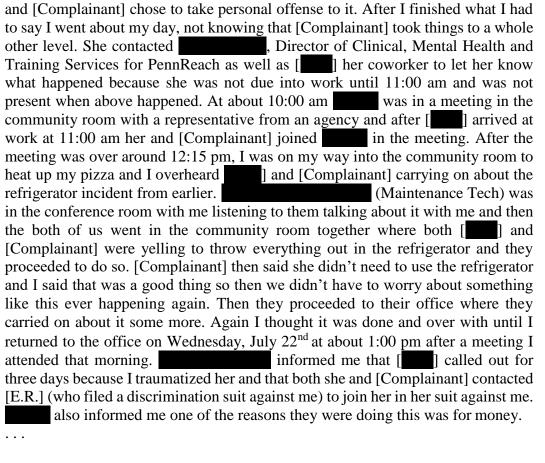


also filed a complaint with DCR making similar allegations; a decision in that matter is being issued today under DCR Docket No. EL11JB-65479.



In her follow up interview with DCR, and Complainant felt uncomfortable working with Mastrolia because of her racist comments. told DCR that O'Dell instructed her to be non-confrontational with Mastrolia. She stated that she asked O'Dell to do something about Mastrolia's comments, but O'Dell took no action because she was afraid that Mastrolia would have PMC cancel the Academy Place contract, which provided PennReach's funding and free office space. According to provided PennReach's funding and free office space. According to provided that she appreciated for tolerating Mastrolia's comments and behavior, and expected the staff to do the same.
O'Dell told DCR that never complained that Mastrolia was making racist comments. She recalled telling that it was in her best interest to have a good working relationship with Mastrolia because if PennReach lost the Academy Place contract, and Complainant would lose their jobs because the PMC contract paid for their salaries.
B. Separation from Employment
On July 30, 2015, O'Dell told Complainant and that they were being transferred out of Academy Place to another location that was over 45 minutes from Complainant's home, with a reduction in their pay rate. In response to the verified complaint, PennReach asserted that the transfers were prompted by their conduct during a July 25, 2015 incident with Mastrolia.
Complainant told DCR that she returned from vacation on July 25, 2015, and overheard Mastrolia speaking with about the refrigerator. She said that Mastrolia then said to her, "Is this how you people live at home?" Complainant stated that she replied that the way Mastrolia spoke to her and was insulting, especially when Mastrolia referred to them as "you people." Complainant recalled Mastrolia saying that it was her building and she could speak in whatever way she pleased. Complainant said that was supportive and spoke with Complainant regarding her concerns about how Mastrolia spoke to her.
arrived at work later that afternoon, and Complainant attended a meeting with and an individual visiting from an outside agency. Complainant and both stated that during that meeting, Mastrolia entered the community room by slamming the door shut. According to Complainant and Mastrolia started shouting about the contents of the refrigerator.
They stated that Mastrolia said, "Fuck this, I'm throwing everything away," which she proceeded to do. Complainant said that she told Mastrolia that only one bag in the refrigerator was a PennReach bag, but Mastrolia ignored her and continued screaming at her and Complainant and both said that Mastrolia told them that it was her refrigerator and that they would no longer be allowed to use it. Complainant said that at that time, she and left the room.
told DCR that Mastrolia became angry and started accusing PennReach staff of leaving rotten food in the refrigerator. According to make a said, "I'm going to throw all of this stuff out said that Complainant told Mastrolia that PennReach staff did not own most of the food in the refrigerator, but Mastrolia became angrier and kept repeating, "I'm





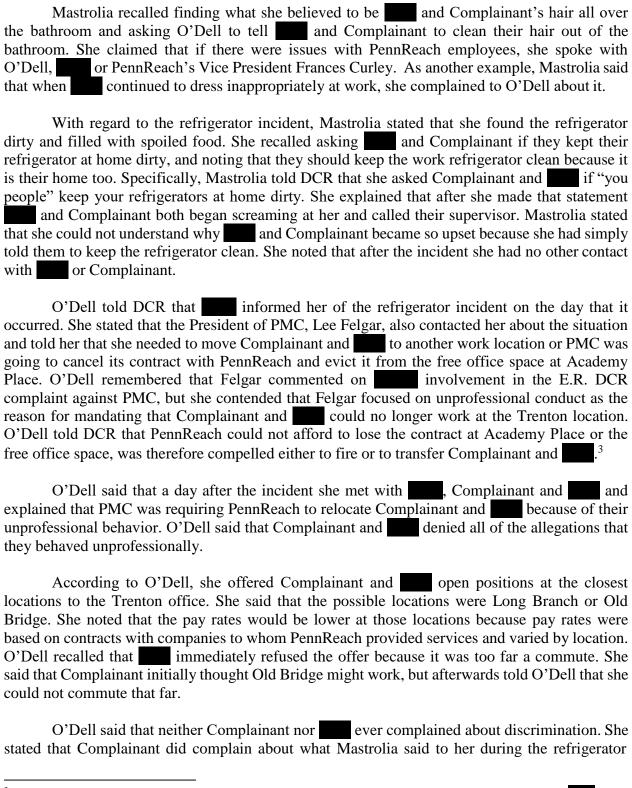
I have complained on a weekly basis about having PennReach in my office only because of these two employees of theirs. They are unprofessional. I continue to work in a very hostile environment when they are present. When it is just my staff and the company, the office is very peaceful and runs like an office should. Pennrose expects a certain standard from both my staff and I and we take that very seriously as representatives of both the owners and Management Company but we have two bad apples that are spoiling the bunch.

[Mastrolia note, undated and unaddressed].

The investigation did not reveal that Mastrolia or any other of Respondents' employees had complained about Complainant or prior to the refrigerator incident.

Mastrolia told DCR that she did not make any race-based offensive comments to anyone at work. Respondent pointed out that Mastrolia was dating a Black man, and therefore would never make any racially offensive statements.

In a recent interview with DCR, Mastrolia claimed that she did not have day-to-day interactions with PennReach employees because PennReach employees were out of the office on many days. She stated that she tried to run a professional office, and noted that frequently came dressed inappropriately for work. She said that Complainant dressed professionally.



<sup>&</sup>lt;sup>3</sup> In a follow up interview with DCR, O'Dell stated that she made the decision to move Complainant and based on their part in the refrigerator incident and their past poor performance. She denied that PMC had any involvement in the decision to move Complainant and and stated that PMC never threatened to terminate the Academy Place contract.

incident. O'Dell admitted that she heard Mastrolia use the phrase, "you people" regularly, but she believed that it was a reference to PennReach employees as opposed to Complainant's and race.

DCR spoke with Felgar about Complainant's allegations. Felgar did not recall the situation. He stated that he did not remember telling O'Dell that Pennrose would terminate the Academy Place contract with PennReach if O'Dell did not remove and Complainant.

## **Analysis**

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2(a). "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." N.J.A.C. 13:4-10.2(b).

A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." <u>Ibid.</u>

Complainant brings claims against both her employer of record, PennReach, and the company that managed the property at which Complainant worked, PMC. During the course of the investigation, it became apparent that Complainant is alleging that PMC subjected her to a racially hostile work environment based on ongoing comments made by its employee, building manager Dawn Mastrolia. Complainant's interviews with DCR also made it evident that she is claiming that PennReach subjected her to a racially hostile work environment. Essentially, Complainant alleges that O'Dell knew that Mastrolia was creating a race-based hostile work-environment and that O'Dell forced Complainant to accept the harassment under threat of losing her job. In this context, Complainant claims that O'Dell was a party to Mastrolia's harassment.

## A. PMC's Liability

PMC asserts that it was not Complainant's employer of record. Although the retaliation provisions of the LAD apply to "any person," and are not limited to employers, N.J.S.A. 10:5-12(d), with regard to Complainant's hostile work environment claim, there is a threshold question of whether PMC can be considered Complainant's employer or, in the alternative, whether PMC could have aided and abetted PennReach in discriminating against Complainant based on race.

## 1. Employer Liability

We start from the well-settled conclusion that the LAD is to be construed liberally so that it may best serve its ultimate goal of eradicating discrimination in New Jersey. <u>Andersen v. Exxon Co., U.S.A.</u>, 89 N.J. 483, 495 (1982); <u>see also, Fuchilla v. Layman</u>, 109 N.J. 319, 334 (1988). The

Appellate Division has recognized that non-traditional employment relationships may be protected by the LAD, and that in some circumstances an individual may be deemed to be jointly employed by two entities. <u>Hoag v. Brown</u>, 397 N.J. Super. 34, 47-48 (App. Div. 2007); <u>Scafuri v. Sisley Cosmetics</u>, 2009 Lexis 2913 (App. Div. November 25, 2009); <u>Pukowsky v. Caruso</u>, 312 N.J. Super. 171, 182-83 (App. Div. 1998) (adopting twelve-part "totality of the circumstances" test to determine employee status); <u>Kurdyla v. Pinkerton Security</u>, 197 F.R.D. 128, 134 (D.N.J. 2000) (finding that an individual may be an employee of multiple employers for the purposes of applying a particular statute, including anti-discrimination enactments such as the LAD).

To determine whether an individual is an employee of a particular employer under the LAD, the courts review twelve factors:

(1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation--supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

Pukowsky, supra, 373 N.J. Super. at 182-83.

As guidance, the courts have pointed out that the most pertinent of these factors is the first: the employer's ability to govern the way in which the worker performs his or her job duties. <u>Franz v. Raymond Eisenhardt & Sons, Inc.</u>, 732 F. Supp. 521, 528 (D.N.J. 1990). However, courts consider all factors from the <u>Pukowsky</u> test when assessing whether an individual is an employee of a certain employer.

In the present case, the totality of the circumstances demonstrate that PMC acted as an employer as that term is defined in the LAD. First, based on the Agreement's provisions and statements, it appears that PMC had overriding authority to control PennReach's employees. While PMC may not have completely controlled Complainant's day-to-day activities, it had the contractual authority to do so. Further, told DCR that O'Dell would change PennReach's employees' duties or the way in which they completed tasks based on requests that O'Dell received from PMC. And given O'Dell's former role with PMC, and the fact that a principal and senior vice president of PMC serves on the PennReach Board of Directors, it appears that there may be some common management or oversight between the two companies.

PMC also controlled and owned the space in which Complainant worked. Finally, there is evidence that PMC influenced PennReach's decision to remove Complainant and from the Academy Place assignment. Based on the investigation, for the purposes of this probable cause determination only, PMC was an employer of Complainant as that term is defined in the LAD.

# 2. Aiding and Abetting

The New Jersey Supreme Court has held that liability for aiding and abetting under the LAD requires a third party to know that the employer's actions amount to the breach of a duty and to engage in conduct that substantially assists or encourages the employer's unlawful conduct. Tarr v. Ciasulli, 181 N.J. 70, 84 (2004) (citing Restatement (Second) of Torts § 876(b) (1979)). A third party is liable as an aider or abettor only where "(1) the party whom the [third party] aids performs a wrongful act that results in an injury; (2) the third party is generally aware of its role as part of an illegal or tortious activity at the time that it provides the assistance; [and] (3) the third party knowingly and substantially assisted in the violation." Ibid (internal quotations omitted).

Here, Complainants allege that PennReach subjected them to a racially hostile work environment when it failed to address the complaints about Mastrolia's racially discriminatory behavior. The investigation showed that PMC's CEO Felgar knew that Complainant and as well as its prior employee E.R. – complained about Mastrolia creating a racially hostile work environment and took no action to address Mastrolia's conduct (and left Mastolia in charge of the Academy Place location). To the contrary, O'Dell told DCR that Felgar demanded that she move Complainant and to another location while not contemplating taking any action against Mastrolia, the alleged harasser. Thus, there is evidence sufficient to support a theory that PMC aided and abetted PennReach in its creation of a racially hostile work environment.

## **B.** Hostile Work Environment

The LAD makes it illegal to discriminate against an employee in "compensation or in terms, conditions or privileges of employment" based on race. N.J.S.A. 10:5-12(a).

To establish a claim that a work environment is racially hostile, the evidence must show that the harassing conduct (1) would not have occurred but for the complainant's race and (2) was severe or pervasive enough (3) to make a reasonable person of the complainant's race perceive that work place is hostile or abusive. Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 25 (2002) (citing Lehmann v. Toys 'R' Us, 132 N.J. 587, 603-04 (1993)). In evaluating severity or pervasiveness, the courts consider the "nature of the conduct itself, 'rather than the effect of the conduct on any particular plaintiff." Barroso v. Lidestri Foods, Inc., 937 F. Supp. 2d 620, 632 n. 9 (D.N.J. 2013) (quoting El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 179 (App. Div. 2005)). A hostile work environment claim requires that the reviewer consider the totality of the circumstances, "which may include the frequency of the discriminatory conduct; its severity;

<sup>&</sup>lt;sup>4</sup> To the extent that PMC is an employer under the LAD, if one were to conclude that PennReach is not liable for creating the hostile work environment, it may still liable for aiding and abetting PMC in its creation of a racially hostile work environment. While O'Dell denied that Complainant told her that Mastrolia's comments were discriminatory in nature, she admitted that she heard Mastrolia make comments in which she referred to Complainant and eas "you people." told DCR that she discussed Mastrolia's offensive comments with O'Dell and multiple times. She said that O'Dell told her that PennReach employees needed to tolerate Mastrolia's comments because they needed the contract with PMC. While O'Dell said that she never told that PennReach employees needed to tolerate discriminatory treatment, O'Dell noted that Mastrolia made offensive comments and agreed that she told that PennReach employees needed to get along with Mastrolia because the contract with PMC – and their jobs – were dependent on how PennReach employees interfaced with PMC employees. In this instance, the investigation has uncovered sufficient evidence for purposes of a finding of probable cause that O'Dell was aware that Mastrolia's conduct was discriminatory and furthered the harassing behavior either by act or omission. Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008)

whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee's work performance." <u>Ibid.</u>

The investigation revealed evidence that Mastrolia made numerous comments about "your people" or "you people" and other derogatory remarks about Black people, including: (1) "you people have no bathroom etiquette"; (2) "You can have a party as long as you ain't got no grease all over the place because you cook fried chicken"; (3) "your people are on section 8"; (4) "your people don't like dogs"; (5) "your people are on welfare"; (6) "your people are single mothers"; (7) "I'm sick of you people"; and comments about how Black employees dressed and about Black women going into the bathroom and leaving hair weaves on the floor.

Complainant, and all told DCR that they felt Mastrolia's comments were racially charged and demeaning. O'Dell admitted to hearing Mastrolia use the phrase "you people," but denied that it was racially offensive. told DCR that he heard Mastrolia use racially inappropriate language to other employees and in her personal phone conversations.

While Mastrolia was not Complainant's supervisor, she was the person who controlled the office in which Complainant worked, and the investigation showed that O'Dell had told both Complainant and that they had to tolerate Mastrolia's comments because Mastrolia could influence PMC to terminate its contract with PennReach, which could result in the loss of Complainant's job. Given her position of authority, the law deems Mastrolia's harassing comments to be chargeable to the employer. See Taylor v. Metzger, 152 N.J. 490, 503-04 (1998) (noting that where the harassing conduct is perpetrated by the employer or supervisor, it greatly enhances the severity of the harassment); Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008) (holding that supervisor's acts of either omission or commission can form the basis for a hostile work environment claim against the employer). Moreover, even if Mastrolia were deemed to not be a supervisor, O'Dell's failure to take measures to correct the hostile work environment, even though she was aware of Mastrolia's comments, means that PennReach was negligent in failing to address the racially hostile work environment.

Based on the investigation, the Director is satisfied that there is "reasonable ground of suspicion . . . to warrant a cautious person" to believe that Mastrolia's actions and statements were severe or pervasive enough to make a reasonable Black person believe that the workplace was racially hostile. N.J.A.C. 13:4-10.2(b). In addition, the investigation produced proof sufficient to make a "cautious person" think that O'Dell's and failure to take remedial action and correct the situation violated the LAD. <u>Ibid.</u>

## C. Retaliation

Complainant also alleged that the Respondents retaliated against her for complaining about Mastrolia's racially insensitive comments. DCR amended the complaint to include a claim that PennReach aided and abetted PMC in retaliating against Complainant.

The LAD prohibits "any person" from retaliating against employees for opposing any act forbidden by the LAD. N.J.S.A. 10:5-12(d). To set forth a prima facie case of retaliation, a complainant must show that: "(1) [he or she] engaged in a protected activity known by the

employer; (2) thereafter their employer unlawfully retaliated against them; and (3) [his or her] participation in the protected activity caused the retaliation." <u>Craig v. Suburban Cablevision</u>, 140 N.J. 623, 630-31 (2001) (citations omitted).

Complainant engaged in LAD-protected activity when she complained to O'Dell and about Mastrolia's discriminatory comments. There is evidence supporting a reasonable suspicion that both Respondents were involved in subjecting Complainant to an adverse employment action when Respondents forced her to choose between working from a distant location at a lower pay rate or losing her job. And the investigation supports a reasonable suspicion that the Respondents took the adverse employment action against Complainant because she refused to simply accept or ignore Mastrolia's racially hostile comments.

Therefore, the investigation revealed evidence sufficient to support a finding that Respondents retaliated against Complainant for opposing conduct prohibited by the LAD.

#### **D.** Conclusion

Based on the above, the Director finds at this preliminary stage of the process that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits." <u>Frank</u>, <u>supra</u>, 228 N.J. Super. at 56.

Date: April 26, 2019 Rachel Wainer Apter, Director NJ DIVISION ON CIVIL RIGHTS

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